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IN THE HIGH COURT OF JUDICATURE OF CHHATTISGARH AT BILASPUR.

~~Cr.A. 305/05~~

CRIMINAL APPEAL NO. 175 /2002.

Cr.A.(175/02

APPELLANTS (In Jail) :

1. Gulab Khan S/o Mansoor Ahmad, Age about 22 years, R/o Ameenpur, P.S. Kataril, Distt. Allahabad (U.P).

2. Vinod Kumar S/o Anand Nag, Age about 21 years, R/o Sanjay Nagar, Bodhghat, Jagdalpur (C.G).

3. Shabbir @ Shabbu S/o Husain Beg , Age about 19 years, R/o Jawahar Nagar, Jagdalpur (C.G).

4. Minaz Khan @ Guddu S/o Nurudding, Age about 23 years, R/o Near Masjid, Geedan, Distt. Dantevada (C.G).

(1823) Filed on 26-4-02 by Shri V. Lakshmanrao Advocate R. to D.R.(J)

VERSUS

RESPONDENT : The State of Chhattisgarh.

MEMORANDUM OF APPEAL UNDER SECTION 374 OF THE CODE OF CRIMINAL PROCEDURE.

A.F.R.

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XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

**मामला क्रमांक** ...G.A.475/... **सन् 2002**

**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

22-2-2007

Mr. Y.C. Sharma, counsel for the appellants.

Mr. Akhil Mishra, Panel Lawyer for the State/respondent.

Oral judgment dictated on Dais.

Per L.C. Bhadoo, J.: -

This appeal is directed against the judgment of conviction and order of sentence dated 12-4-2002 passed by the 2nd Additional Sessions Judge, Baloda Bazaar, in Sessions Trial No.351/2001, whereby learned Additional Sessions Judge after holding accused/appellants Gulab Khan, Vinod Kumar, Shabbeer @ Shabboo & Minaz Khan @ Guddu guilty for commission of offence under Sections 397 & 302 of the I.P.C., sentenced each of the accused to undergo R.I. for seven years and to undergo imprisonment for life and pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for six months, respectively.

Case of the prosecution, in brief, is that deceased Santosh Kashyap, resident of Jagdalpur, was working as driver of Tata Sumo vehicle bearing registration No.MP-23/G-5230 of which PW-17 Yusuf Sherwani's wife Jetun Sherwani was the registered owner. The said vehicle was hired on 25-5-1999 from Jagdalpur to Bilaspur and next day, the body of Santosh Kashyap

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**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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was found near Simga on Sarora Sankra PWD road near a culvert. Merg intimation Ex.P-5 was given by Gopidas (PW-3), Kotwar, in Police Station: Simga to the effect that in the morning at about 8 a.m. when he was returning from the pond to his house after taking bath, village Sarpanch Sanat Thakur informed him that on Sarora Sankra road near a culvert, a dead body is lying, on which he went to the place and saw the body of a person aged about 25-30 years.

After receiving this merg intimation, the Station House Officer, Police Station: Simga, left for the scene of occurrence and after giving notice Ex.P-6 to the Panchas, he prepared inquest Ex.P-7 on the body of an unknown person. Under Ex.P-8, he seized one empty match box, one pocket comb and 5 half burnt bidi buds. He also seized one belt, one pair of shoes of Royal Club company, plain soil and blood stained soil under Ex.P-9. He also seized pieces of hair which were in both the fists of the deceased under Ex.P-10. Clothes of the deceased which were given by Mekahara Hospital were seized under Ex.P-11. The body was sent for post-mortem examination to Mekahara Hospital, Raipur, where Dr. Arvind Neralwar conducted post-mortem on the body of the deceased and he opined that the cause of death was coma due to head injury and the death was homicidal in nature. He prepared post-mortem report Ex.P-27. Site plan Ex.P-25 of the place of occurrence was prepared by the Patwari Halka. Dehati Nalishi Ex.P-35 was given by Satyendra Pandey, Station House Officer, Police Station: Simga, based on that, first information report Ex.P-36 was registered. During investigation, hairs of accused persons Shabbir Beg, Gulab, Minaz Khan &

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**आदेश पत्रक (पूर्वानुबद्ध)**

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| | Vinod Kumar were seized under Exs.P-1 to P-4, respectively. During police custody, accused Shabbir Beg gave memorandum Ex.P-12 and in pursuance of that, Rs.1,280/- and one full shirt stained with blood were seized under Ex.P-17. Accused Vinod Kumar gave memorandum Ex.P-13 and in pursuance of that, Rs.2,000/- were seized under Ex.P-18. Accused Minaz Khan gave memorandum Ex.P-14 and in pursuance that, Rs.10,000/- and one golden ring valuing Rs.1,500/- were seized under Ex.P-19. Accused Gulab Khan gave memorandum Ex.P-14A and in pursuance of that, an amount of Rs.10,500/- & one full shirt were seized under Ex.P-20, and one Kataar was seized under Ex.P-23. Accused Raj Narayan gave memorandum Ex.P-15 and in pursuance of that, Rs.700/- were seized under Ex.P-21 and one air bag were seized under Ex.P-22. Seized clothes were sent for chemical examination to Forensic Science Laboratory, Sagar, from where the report dated 10-9-1999 was received.<br><br>After completion of investigation, charge sheet was filed against the accused persons in the Court of Judicial Magistrate, Baloda Bazaar, who in turn committed the case to the Sessions Judge, Raipur, from where learned 2nd Additional Sessions Judge, Baloda Bazaar, received the case on transfer for trial. However, accused Raj Narayan & Chunnu @ Mobin were released on bail and they jumped the bail. Therefore, trial proceeded against the present four accused/appellants.<br><br>In order to establish charge against the accused persons, the prosecution examined 18 witnesses. Statements of the accused persons | |

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**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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were recorded under Section 313 of the Cr.P.C. in which they denied the material appearing against them in the prosecution evidence, they pleaded innocence and submitted that they have been implicated in a false case.

Learned Additional Sessions Judge after hearing counsel for the parties convicted and sentenced the accused/appellants as aforementioned.

We have heard Mr. Y.C. Sharma, learned counsel for the accused/ appellants and Mr. Akhil Mishra, learned Panel Lawyer on behalf of the State/respondent.

At the outset, Mr. Y.C. Sharma has not disputed the homicidal death of Santosh Kashyap. Moreover, Dr. Arvind Neralwar (PW-12) has stated in his evidence that on 27-5-1999 when he was working as Demonstrator in the Forensic Science Department of Medical College, Raipur, he conducted post-mortem on the body of an unknown person and there was a lacerated wound on left ear and on left side of the face in the size of 5 cms. x 3 cms. bone deep; contusion & abrasion on right side of the face in the size of 8 cms. x 3 cms. area; fracture of low jaw; abrasion & contusion on right side of chest and on right shoulder in the size of 10 cms. x 4 cms.; abrasion & contusion on right side of the face in the size of 3 cms. x 2 cms.; marks of nylon rope on the thyroid cartilage in the size of 0.75 cms. to 1.25 cms. in width, the marks were connected with corners of each one, the marks were horizontal and the marks were post-mortem in nature. There was fracture of temporal parietal bone and there was haemorrhage in the temporal parietal area. The cause of death was coma as a result of head injury. The injuries were

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**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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sufficient in the ordinary course of nature to cause death and the death was homicidal in nature. Therefore, it is established that the death was homicidal in nature.

As far as involvement of the accused/appellants in the crime in question is concerned, there is no direct evidence in this case. The case rests on the circumstantial evidence. As per the settled law for resting conviction based on the circumstantial evidence as has been held by the Apex Court in the matter of **Dhananjoy Chatterjee vs. State of W.B.** reported in **(1994) 2 SCC 220**:

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. These circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

The prosecution has tried to connect the accused persons with the crime in question on the following circumstances: -

1. that, deceased Santosh Kashyap while taking Tata Sumo jeep informed his owner Yusuf Sherwani (PW-17) that the vehicle is

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**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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required by his friend Vinod Kumar for the purpose of taking his officer's family to Bilaspur;

2. that, accused Vinod Kumar while in police custody gave memorandum Ex.P-13 and in pursuance of that, Rs.2,000/- out of the sale money of the vehicle were seized under Ex.P-13;
3. that, accused Gulab Khan while in police custody gave memorandum Ex.P-14A and in pursuance of that, an amount of Rs.10,500/- out of the sale money of the vehicle was seized under Ex.P-20 and one iron Patta in the shape of Kataar was seized under Ex.P-23;
4. that, accused Shabbeer while in police custody gave memorandum Ex.P-12 regarding the amount of Rs.4,000/- of sale money of the vehicle and in pursuance of that, Rs.1,280/- out of the sale money of the vehicle and one shirt stained with blood were seized under Ex.P-17; and
5. that, accused Minaz Khan while in police custody gave memorandum Ex.P-14 regarding the amount of Rs.15,000/- of sale money of the vehicle and in pursuance of that, Rs.10,000/- and one golden ring purchased from the sale money of the vehicle were seized under Ex.P-19.

Coming to the first circumstance that deceased Santosh Kashyap while taking the vehicle informed Yusuf Sherwani (PW-17), owner of the vehicle, that the vehicle is required by his friend accused Vinod Kumar for the purpose of taking the family of his boss to Bilaspur, Yusuf Sherwani has been examined as PW-17. In his evidence he has stated that on the date of

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**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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| | incident, in the evening, he was at his shop, at about 7 p.m. Santosh Kashyap came to him and said that he has a friend named Vinod Nag who is driver of Government vehicle, as the vehicle of Vinod Nag has gone out of order, therefore, vehicle is required for taking the family of his boss to Bilaspur, on which he permitted Santosh Kashyap to take the vehicle after informing him. Santosh Kashyap took the vehicle, but he did not return even after 3-4 days, nor he received any information, therefore, he enquired about his whereabouts from his family members, but his whereabouts could not be known. He went to Police Station: Bodhghat and lodged the report. Thereafter, he saw the photo of Santosh Kashyap and he took that photo to his brother who came to Police Station: Simga to take the body. Thereafter, brother of Santosh Kashyap came and informed him that the body was of his brother. The Tata Sumo vehicle has not been traced out so far. In cross-examination, this witness Yusuf Sherwani (PW-17) has stated that at the time of giving police statement, he might not have mentioned the name of Vinod. Santosh Kashyap asked him that the vehicle is required by his driver friend of Jagdalpur for the purpose of taking family of his boss to Bilaspur. He further stated that he was not knowing the name of Vinod till then.<br><br>Now, the question remains as to whether from the above evidence of this witness (PW-17) the prosecution has been able to establish that accused Vinod Kumar was the person who took the vehicle for the purpose of taking the family of his boss. | |

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**आदेश पत्रक (पूर्वानुबद्ध)**

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| | Yusuf Sherwani (PW-17) has categorically stated in his evidence that he was not knowing the name of Vinod Nag, but he had an occasion to see him. In order to prove that accused Vinod was the person who took the vehicle, the best piece of evidence available with the prosecution was the report lodged by Yusuf Sherwani (PW-17) in Police Station: Bodhghat when Santosh Kashyap did not return for 3-4 days. If at all accused Vinod had taken the vehicle and deceased Santosh Kashyap informed Yusuf Sherwani (PW-17) about the same, then that fact must have mentioned therein. That report would have been the best piece of evidence in order to establish whether Santosh Kashyap before leaving for Bilaspur informed Yusuf Sherwani (PW-17) that his friend Vinod, the accused/appellant herein, needs vehicle for the purpose of taking the family of his boss to Bilaspur and that is why he is taking the vehicle. The reasons for suppression of that report are best known to the prosecution.<br><br>Other circumstance by which the prosecution has tried to connect the accused persons with the crime in question as per the prosecution case, is that after committing the murder of Santosh Kashyap, Tata Sumo vehicle was taken away and sold somewhere else in Uttar Pradesh at the cost of Rs.50,000/-, out of that amount as per the memorandum Ex.P-13 of accused Vinod, Rs.4,000/- came to his share. It is stated that out of the said amount of Rs.4,000/-, Rs.2,000/- were recovered from the accused under Ex.P-18. Independent witnesses to the memorandum and the seizure memo were Sanat Kumar (PW-5) and Jagannadh Yadu. | |

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**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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| | In the first instance, Investigating Officer Satyendra Pandey who recorded the said memorandum and recovered the amount has not been examined by the prosecution in spite of ample opportunity given to the prosecution, only A.S. Khan (PW-16), the Inspector, has been examined who has simply stated that the seizure memo and the memorandum bear the signature of Satyendra Pandey. Therefore, virtually the prosecution evidence before the Court that whether this accused (Vinod Kumar) gave memorandum Ex.P-13 to the effect that Rs.4,000/- which came to his share out of the sale money of the vehicle was retained with him and he could get the same recovered, has not been proved by examining Satyendra Pandey before whom the disclosure was made. It is not the case that Satyendra Pandey was not alive or it was not possible to produce him who was a public servant. Moreover, in this memorandum it has not been mentioned that where he kept Rs.4,000/-. Even the driving license and purse which are said to have been thrown in Chilifi Ghati were also not recovered. Out of the independent witnesses namely, Sanat Kumar and Jagannadh Yadu only Sanat Kumar has been examined as PW-5. The evidence of Sanat Kumar is to the effect that the Police people had already recorded the statements of the accused person, no statement of the accused person was recorded before him and memorandum Ex.P-13 bears his signature, he put his signature on being asked by Police Officer saying that "the accused has admitted the crime, therefore, you sign here", that is why he signed. He has further stated that only Rs.1,000/- were seized from accused Vinod Kumar. He has nowhere stated that from which place it was seized. Moreover, the seizure | |

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**आदेश पत्रक (पूर्वानुबद्ध)**

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memo mentions that Rs.2,000/- were seized, whereas, this witness has stated that only Rs.1,000/- were sized.

For the foregoing reasons, the prosecution has not been able to establish that memorandum Ex.P-13 was given by the accused and in pursuance of that the money was recovered from the accused. Moreover, the currency notes to the tune of Rs.2,000/- were recovered. In the circumstances, it is difficult to connect the accused with the crime in question based on the unproved recovery. The prosecution was required to adduce evidence to the effect that what kind of information was given by the accused. The Investigating Officer before whom the information was given ought to have come and deposed in actual words of the accused regarding the information about the recovery at the instance of the accused. Neither the Officer before whom the memorandum and the subsequent seizure made by him has been examined, nor the independent witness has supported the prosecution case. Therefore, there is no other evidence adduced by the prosecution in order to connect the accused with the crime in question, as such, we are of the considered opinion that the prosecution has not been able to establish the circumstances in connecting the accused Vinod Kumar with the crime in question.

Now, coming to accused persons Gulab Khan, Shabbeer @ Shabboo & Minaz Khan @ Guddu, against whom the only circumstance is that accused Gulab Khan gave memorandum Ex.P-14A, in pursuance of that an amount of Rs.10,500/- & one iron Patta in the form of Kataar were recovered under

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**आदेश पत्रक (पूर्वानुबद्ध)**

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| | Ex.P-20 & Ex.P-23, respectively. memorandum Ex.P-12, in pursuance of recovered under Ex.P-17. Accused Ex.P-14 regarding Rs.15,000/-, out of ring were seized under Ex.P-19.<br><br>The prosecution has failed to establish these memorandums and recoveries on the same ground which has been mentioned in the case of accused Vinod Kumar for the reason that these memorandums were given before Satyendra Pandey and recoveries were also effected by him, he has not been examined and there is no evidence adduced before the Court in order to prove memorandum, recovery and the actual words said by the accused regarding the memorandum given by the accused persons. Out of the two independent witnesses before whom memorandum and recoveries were made, one witness Sanat Kumar (PW-5) has been examined. As has been mentioned earlier, he has stated that before he could reach, the Police had already recorded the statements of the accused persons, their statements were not recorded before him. Exs.P-12, P-13, P-14 & P-15 bear his signature which he put on being asked by the Police Officer. He also stated that the seizure memos bear his signature, but he has not stated that at the instance of the accused persons the amount and articles were recovered. Virtually there is no legal evidence adduced by the prosecution in order to prove memorandum and recovery at the instance of the accused persons. Moreover, merely on the basis of the amount recovered it is difficult to connect the accused persons with the crime in question, because | Accused Shabbeer @ Shabboo gave that Rs.1,280/- and one full shirt were Minaz Khan @ Guddu gave memorandum that only Rs.10,000/- and one golden |

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**आदेश पत्रक (पूर्वानुबद्ध)**

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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this is a very weak type of evidence to connect the accused with crime. Unless the amount recovered is so huge for which the accused is not able to explain the possession looking to his financial position or there is any specific marking or number of currency notes are given or the person to whom, or in whose presence the vehicle was sold, comes forward and establish that the accused persons sold the vehicle to them or in their presence and money was given to the accused persons in lieu thereof or any written document is placed on record regarding the sale of looted vehicle, it will not be possible to connect the accused persons with the crime in question.

There is no FSL report to prove the fact that there was any human blood, that too of the blood group of the deceased on the Kataar and full shirt of the accused persons, in order to connect them with the crime in question.

For the foregoing reasons, finding of the trial Court convicting and sentencing the accused persons for commission of offence under Sections 397 & 302 of the I.P.C. cannot be sustained, as there is no legal and clinching circumstantial evidence connecting the accused persons with the crime in question.

At this stage, we would like to mention here that learned Additional Sessions Judge has framed charge against the accused persons under Section 397 of the I.P.C. and convicted & sentenced them under Section 397 of the I.P.C. Section 397 of the I.P.C. is not a substantive offence. It

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**आदेश पत्रक (पूर्वानुबद्ध)**

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| | prescribes minimum sentence when "at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years". Therefore, substantive charging offence must be either Section 395 or 392 of the I.P.C. Learned Additional Sessions Judge ought to have charged the accused persons for commission of offence under Section 395 read with Section 397 of the I.P.C.<br><br>In the result, the appeal succeeds and the same is allowed. Conviction and sentences imposed upon accused/appellants Gulab Khan, Vinod Kumar, Shabbeer @ Shabboo & Minaz Khan @ Guddu under Sections 397 & 302 of the I.P.C. are set aside. They are acquitted of the above charges. Accused/ appellants Gulab Khan, Shabbeer @ Shabboo & Minaz Khan @ Guddu are already on bail, their bail bonds are discharged and they need not surrender before the Court. Accused/appellant Vinod Kumar is in detention since 15-6-1999, he be set on liberty forthwith, if not required in any other case.<br><br>**Sd/-**<br>**L.C. Bhadoo**<br>**Judge** | **Sd/-**<br>**DHIRENDRA MISHRA**<br>**Judge** |